IN THE

Supreme Court of the United States

No. 4[illegible]7

SAGER GLOVE CORPORATION,
Petitioner,

vs.

AETNA INSURANCE CORPORATION, *ET AL.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM C. WINES,
JAMES B. MARTIN,
One North La Salle Street,
Chicago 2, Illinois,
Tel.: DE. 2-4426,
Attorneys for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO [illegible] 355

INDEX

	PAGE
The Opinion Below	1
Jurisdiction	1
The Date of the Judgment Sought to be Reviewed	2
The Date of the Order denying Rehearing	2
The Statutory Provision conferring on this Court Jurisdiction to Review the Judgment in Question	2
The Question Presented for Review	3
Statement of the Case	3
Argument for Certiorari	6
I—Under Illinois' substantive law of insurance, the question whether the respondent insurance company's contact "actually did induce [petitioner and its president] to think or believe that a settlement might be consummated and to act accordingly" is a question of the subjective intent of the assured and "should have been submitted to the jury."	6
II—This case is of sufficient moment to elicit certiorari	9
Appendix I—Opinion of the United States Court of Appeals for the Seventh Circuit, May 10, 1963	11
Appendix II—Opinion of the United States District Court	18
Appendix III—Judgment of the United States Court of Appeals for the Seventh Circuit	25

Table of Cases Cited.

USC, Title 28, Sec. 1254 2

Chicago & Western Indiana R. R. Co. v. Guaranty Co. of North America, 207 Ill. App. 483 6

Elgin J. & E. Railway Company v. Burley (1945), 325 U. S. 711 8

Erie R. Co. v. Tompkins, 304 U. S. 64 8

IN THE

Supreme Court of the United States

No.

SAGER GLOVE CORPORATION

Petitioner,

vs.

AETNA INSURANCE CORPORATION, *ET AL.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REFERENCE TO THE OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is appended in full as Appendix I to this Petition.

THE GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The United States District Court for the Northern District of Illinois has entered and the Court of Appeals for the Seventh Circuit has affirmed a summary judgment in

favor of the insurance companies that have written the policies of burglary insurance upon which this suit is brought, and against the petitioner.

That judgment and the affirmance thereof denies petitioner its right to trial by jury under the Seventh Amendment upon material and substantially controverted issues of fact emerging from the record and reflected in the opinion of the Court of Appeals.

This is a timely petition for this Court's writ of certiorari to review the questions hereafter stated and discussed. Those questions are of sufficient importance, not merely to the parties but in the field of summary judgment as contrasted with trial by jury, to evoke this Court's writ of certiorari.

THE DATE OF THE JUDGMENT SOUGHT TO BE REVIEWED.

The judgment of the Court of Appeals for the Seventh Circuit was rendered on May 10, 1963. A copy of that judgment is reproduced as Appendix II to this Petition.

THE DATE OF THE ORDER DENYING REHEARING.

Petitioner's timely petition for rehearing was denied on June 5, 1963.

THE STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

This Court's jurisdiction to review the judgment in question is conferred by Section 1254 of the Judicial Code (28 U. S. C. 1254).

THE QUESTION PRESENTED FOR REVIEW.

DOES THE SUMMARY JUDGMENT OF WHICH REVIEW IS SOUGHT DENY PETITIONER ITS RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT BECAUSE (1) ILLINOIS' SUBSTANTIVE LAW OF INSURANCE DECLARES THAT A DEFENSE TO AN INSURED'S CLAIM OF THE GROUND OF TARDINESS UNDER THE POLICY MAY BE WAIVED BY CONDUCT OF THE INSURER'S WHICH "INDUCES" THE ASSURED TO PERSEVERE IN THE CLAIM, (2) ILLINOIS' LAW DECLARES THE QUESTION OF "REASONABLE RELIANCE" TO BE A QUESTION OF FACT FOR A JURY AND (3) PETITIONER'S PRESIDENT'S AFFIDAVIT MADE A SHOWING THAT THE RESPONDENT INSURANCE COMPANY'S ACTIVITIES AFTER THE PRESENTATION OF ITS CLAIM INDUCED HIM TO FILE AND PERSEVERE IN THE INSTANT SUIT?

STATEMENT OF THE CASE.

All quotations in this Statement of the Case are from the opinion of the Court of Appeals in this case. Federal jurisdiction was based upon diversity of citizenship and the presence of the jurisdictional amount.

> "Plaintiff Sager Glove Corporation brought this action against Aetna Insurance Corporation and 21 other insurance companies on January 12, 1956. Recovery was sought for losses allegedly covered by vandalism and malicious mischief endorsements contained in 67 separate fire insurance policies which losses defendants had refused to pay."

Each of the policies sued upon contain the following provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless commenced within twelve months next after inception of the loss."

"Plaintiff further alleged that the various acts of vandalism and malicious mischief were not discovered by it until January 14, 1955 and that upon discovery defendants were immediately notified."

The District Court and the Court of Appeals, deciding a question of Illinois law, held that the time for the giving of notice of loss began to run from the date of loss and not from the date upon which petitioner claims to have discovered the loss. Mindful that this Court does not ordinarily review the concordant resolutions of lower Federal Courts upon a question of state law, petitioner does not renew that purely local question here.

But, in the language of the Court of Appeals, "in addition to contending that the twelve month time for suit limitation ran from the time of discovery of the losses, which contention we have rejected, *plaintiff urges that defendants waived the time for suit limitation by 'exhausting its investigative prerogatives for a full year after notice of the claimed loss.'*" (Emphasis supplied.)

The question tendered on this petition arises from the following disputations in the record:

As appears from the opinion of the Court of Appeals, petitioner asserted, the defendants did not gainsay the assertion and indeed it was undisputed, that *subjectively*, petitioner's President, Sager, was led to believe that even though respondents did categorically disclaim liability upon the ground of late notice, the defendants, by "exhausting" their "investigative prerogatives for a full year after notice of the claimed loss" waived their alternative repudiation of liability upon the ground of tardy notice.

The Court of Appeals thus stated the exigent substantive law of Illinois in its opinion:

"Under Illinois law a waiver of the time for suit limitation contained in a policy of insurance may be

implied from the insurer's conduct. *E. G., Midwest T. P. Works, Inc. v. Firemen's Ins. Co.*, 36 Ill. App. 2d 65, 183 N. E. 2d 562 (1962) (failure of insurer to notify insured of rejection of proof of loss in time to afford insured a reasonable time to file suit within the time limit); *Chicago & W. I. R. Co. v. Guaranty Co. of N. A.*, 207 Ill. App. 483 (1917) (insurer engaged in negotiations looking towards settlement, thereby deterring insured from filing suit within the time limit); *Covenant Mut. Life Ass'n.* v. *Baughman, et al.*, 73 Ill. App. 544 (1898) (insurer furnished blanks and assisted in preparing proofs of loss, knowing that notice of the claim had not been received until after expiration of the time limit)."

But the District Court and the United States Court of Appeals have held that the question whether the respondent insurance companies waived or did not waive their defense on the ground of "late notice" was one of pure law.

It is petitioner's contention here, as it was in the courts below, that under Illinois law, the question whether an insurance company that has a defense on the ground of late notice waives that defense by treating with the assured, in apparent recognition of at least the existence if not the merit of the claim of loss, waives that defense, is a question, not of law, but of fact.

And it is petitioner's contention that since that question was one of fact, the Seventh Amendment entitled petitioner to a resolution of that question by a jury.

ARGUMENT FOR CERTIORARI.

I.

Under Illinois' substantive law of insurance, the question whether the respondent insurance company's contact "actually did induce [petitioner and its president] to think or believe that a settlement might be consummated and to act accordingly" is a question of the subjective inte of the assured and "should have been submitted to the jury."

The *rationale* of the opinion of the Court of Appeals was that, as a matter of Illinois law, respondents did not waive their defense on the basis of belated notice by protracting investigations of petitioner's large claims and otherwise treating the petitioner and its counsel for over a year.

Therefore the Court of Appeals affirmed the summary judgment of the District Court.

But under exigent Illinois law, the question whether an insurance carrier waives the defense of belated notice by negotiating or otherwise treating with an assured is one of fact *and depends upon the subjective intention of the insured.*

The exigent Illinois law is set forth in

Chicago & Western Indiana R. R. Co. v. Guaranty Co. of North America, 207 Ill. App. 483.

The *Chicago & Western Indiana R. R. Co.* case, cited above, like the present case, was a suit upon a bond or policy of insurance protecting the insured corporation against losses by theft and defalcation.

After the expiration of the one year period provided in the bond, the plaintiff corporation brought suit upon it.

The contractual period of one year for the forbearing of suits was pleaded in bar.

The evidence showed rather desultory correspondence and communications concerning the plaintiff's claim of loss.

The trial court held in the *Chicago and Western Indiana* case, as the trial court has held in this case, that the correspondence, overtures and communications preceding the filing of the suit were insufficient to toll the contractual bar.

Reversing and declaring the substantive law of Illinois that defines the relevant question of fact, the court said at page 489 (emphasis ours):

> "**If the conduct of appellee actually did induce appellant to think or believe that a settlement might be consummated,** and to act accordingly, then there was evidence of a waiver, or pertaining to a waiver, **that should have been submitted to the jury. It is not a question of meeting of minds, as in the case of a contract, but rather, what effect, reasonably considered, did the overt acts of appellee have on the conduct of appellant.** What effect, if any, appellee's conduct, in the course of the negotiations through its letters and conferences, had upon the conduct of appellant, was a subject to be considered by the jury. **Whether or not the negotiations, conferences and letters did deter the appellant from instituting legal proceedings, where there was, as here, evidence tending reasonably to show that the appellant may have been deterred from beginning suit, was a question for the jury to answer.**"

Once it is perceived that the substantive law of Illinois declares the question of waiver *vel non* is one of fact, petitioner's right to have that question of fact submitted to a jury derives, not from the law of Illinois, but from the Seventh Amendment to the Constitution of the United States.

In

Elgin J. & E. Railway Company v. Burley, (1945), 325 U. S. 711,

this court declared

"The procedure for summary judgment was intended to expedite the settlement of litigation when it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was *any question of fact* presented on the record in the proceedings for summary judgment, the motion could not be sustained. (C. A-7, 1944) 140 Fed. 2d 488. *Cf.* the following cases from this court *Tripp* v. *May* (C A-7, 1951), 189 Fed. 2d 198 and *Compana Corp.* v. *Harrison* (C A-7, 1943), 135 Fed. 2d 334, where this court clearly held that it was improper to draw fact inferences in favor of the party for whom summary judgment is rendered; such as are necessarily found in the trial court's judgment in the instant case.

A summary judgment is an extreme remedy and under the rule should be awarded only where the facts are undisputed. *American Insurance Co.* v. *Gentile Brothers Company* (CA-5) 109 Fed. 2d 732.

This point has been briefly argued because it is so simply clear and simple.

The substantive law of Illinois, concededly finds its application in this court under *Erie R. Co.* v. *Thompkins*, 304 U. S. 64, and makes, subject only to the test of reasonableness, the subjective state of mind of the assured the test of waiver in this case.

The state of the assured's mind and the reasonableness thereof are questions for the jury not for the courts below upon motion for summary judgment.

II.

This case is of sufficient moment to elicit certiorari.

This is *not* merely a case in which a disappointed litigant contends, rightly or wrongly, that lower Federal courts have misprised a question of state law.

Such cases do not usually evoke this court's writ of certiorari.

This is a case in which the lower Federal courts have treated as a question of law or issue that which is a question of fact and have therefore denied petitioner his right to a trial by jury under the Seventh Amendment.

We need not cite this court's many decisions evincing its jealous guardianship of the right of trial by jury in actions at law in the Federal courts and in state courts under Federal statutes.

Petitioner therefore respectfully prays this court's writ of certiorari to review and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM C. WINES,
JAMES B. MARTIN,
One North La Salle Street,
Chicago 2, Illinois,
Tel.: DE. 2-4426,
Attorneys for Petitioner.

APPENDIX I.

In The

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13993 SEPTEMBER TERM, 1962—APRIL SESSION, 1963

Sager Glove Corporation, Plaintiff-Appellant, vs. Aetna Insurance Corporation, et al., Defendants-Appellees.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 10, 1963.

Before HASTINGS, *Chief Judge*, KNOCH and SWYGERT, *Circuit Judges*.

HASTINGS, *Chief Judge*. Plaintiff Sager Glove Corporation brought this action against Aetna Insurance Corporation and 21 other insurance companies on January 12, 1956. Recovery was sought for losses allegedly covered by vandalism and malicious mischief endorsements contained in 67 separate fire insurance policies which losses defendants

had refused to pay. The district court entered judgment on the pleadings with respect to 28 of these policies and summary judgment with respect to the remainder. Plaintiff's appeal followed.

After its original complaint was stricken, plaintiff filed an amended complaint containing 67 counts, 1 count for each policy sued on. Plaintiff alleged in its amended complaint that acts of vandalism and malicious mischief occurred between February 1, 1953 and January 14, 1955. The specific dates of such occurrences varied from count to count. Plaintiff further alleged that the various acts of vandalism and malicious mischief were not discovered by it until January 14, 1955 and that upon discovery defendants were immediately notified.

By its reply to defendants' answer, plaintiff admitted that each policy sued on contained the following limitation: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless commenced within twelve months next after inception of the loss."

With respect to 24 of the policies sued on (group 1 policies), no acts of vandalism and malicious mischief are alleged to have occurred later than December 20, 1953. Thus, it appears from the pleadings alone, with respect to group 1 policies, that the last date for commencing suit within the twelve month limitation period was December 20, 1954. Plaintiff did not discover its loss or notify defendants, much less bring suit, until January 14, 1955.

The district court entered judgment on the pleadings as to all group 1 policies, and plaintiff claims it erred in so doing. It is plaintiff's theory that the twelve month time limitation did not begin to run until the loss was discovered.

We have found no Illinois cases where the phrase involved here—"twelve months next after inception of the loss"—has been discussed as to losses from vandalism or malicious mischief. It is our conclusion that the meaning of the phrase is quite clear. It has nothing to do with the state of mind of the insured. It deals with an objective fact which in the context of this case is a specific act of vandalism or malicious mischief. The loss occurs and has its "inception" whether or not the insured knows of it.

Our view of this phrase finds support in two New York cases where this precise phrase was considered. *Margulies v. Quaker City Fire & Marine Ins. Co.*, App. Div., 97 N. Y. S. 2d 109 (1950); *Thames Realty Corp. v. Massachusetts F. & M. Ins. Co.*, Sup. Ct., 184 N. Y. S. 2d 170 (1959). In *Thames Realty*, insured sued on policies for losses from an explosion which damaged its building. The suit was commenced more than twelve months after the explosion, but insured claimed it discovered the damage only a few months before the action was filed. The court stated that the fact of recent discovery was immaterial and held that the twelve month period began to run from the "occurrence of the event insured against." *Thames Realty Corp. v. Massachusetts F. & M. Ins. Co.*, *supra* at 171.

The district court did not err in entering judgment on the pleadings with respect to the group 1 policies. Time of discovery of the loss by the insured is immaterial, and it appears from the pleadings that suit was not brought within twelve months of any acts of vandalism or malicious mischief alleged with respect to these 24 policies. There is no claim that defendants did anything to prevent discovery of the loss by plaintiff.

As to the remaining 43 policies sued on (group 2 policies), the district court entered summary judgment under Rule 56

Federal Rules of Civil Procedure, 28 U. S. C. A.[1] Losses under 40 of the group 2 policies were alleged to have occurred up to and including January 14, 1955, under 1 policy up to and including March 7, 1954 and under 2 policies up to and including January 15, 1954. The instant suit was filed January 12, 1956. Thus, only those acts of vandalism and malicious mischief alleged to have occurred on January 12, 13 and 14, 1955 were within the twelve month time for suit limitation contained in the group 2 policies.

In addition to contending that the twelve month time for suit limitation ran from the time of discovery of the losses, which contention we have rejected, plaintiff urges that defendants waived the time for suit limitation by "exhausting its investigative prerogatives for a full year after notice of the claimed loss." The earliest possible date of waiver, under such contention, was January 14, 1955 when defendants were first notified of plaintiff's losses. All counts of the complaint with respect to group 2 policies allege acts of vandalism and malicious mischief occurring within the twelve month period preceding January 14, 1955.

There is no genuine issue as to any material fact relevant to the question of waiver. The following facts appear from the amended complaint and the affidavits in support of and

---

[1] The district court entered judgment on the pleadings with respect to four of the group 2 policies. To do so it was necessary to go outside the pleadings to other matter presented to the court. Under such circumstances, a motion for judgment on the pleadings shall be treated as a motion for summary judgment and acted upon accordingly. Rule 12(c), Federal Rules of Civil Procedure, 28 U. S. C. A. We shall treat the judgment entered with respect to these four policies as having been entered on a motion for summary judgment.

in opposition to defendants' motion for summary judgment.

Immediately upon discovery of the losses, plaintiff gave written notice thereof to defendants. Defendants then sent adjusters to discuss such claims with plaintiff's president who was urged by them to prepare an audit for inspection. Shortly after receiving the written notice, defendants denied liability under the insurance policies. On March 8, 1955, plaintiff filed a formal statement of loss with defendants listing the machinery claimed to have been damaged.

Pursuant to provisions in the insurance policies requiring the insured to submit to examination under oath, defendants interrogated plaintiff's president on April 12, April 14, July 18, 1955 and January 11, 1956. Upon defendants' request, plaintiff's president presented at the July 18 examination an audit of plaintiff's books and records relative to the claimed loss.

Plaintiff was aware of the time for suit limitation provision in its policies. In a letter of January 6, 1956 to defendants' counsel from the attorney who was then representing plaintiff, the attorney stated: "[S]ettlement has not been discussed." In an earlier letter, the same attorney had stated: "Inasmuch as the twelve-month limitation on filing our action in the above matter [plaintiff's claim] will expire on the 14th January 1956 • • •." And again in another letter of January 6, 1956, he stated: "The time limitation requires that suit be filed within the next few days • • •."

Under Illinois law a waiver of the time for suit limitation contained in a policy of insurance may be implied from the insured's conduct. *E. g., Midwest T. P. Works, Inc.* v. *Firemen's Ins. Co.*, 36 Ill. App. 2d 65, 183 N. E. 2d 562 (1962) (failure of insurer to notify insured of rejection of proof of loss in time to afford insured a reasonable time

to file suit within the time limit); *Chicago & W. I. R. Co.* v. *Guaranty Co. of N. A.*, 207 Ill. App. 483 (1917) (insurer engaged in negotiations looking towards settlement, thereby deterring insured from filing suit within the time limit); *Covenant Mut. Life Ass'n* v. *Baughman et al.*, 73 Ill. App. 544 (1898) (insurer furnished blanks and assisted in preparing proofs of loss, knowing that notice of the claim had not been received until after expiration of the time limit). None of these factors is present in the case at bar.

Defendants' investigation of the claimed loss did not bring its conduct within the scope of the rule of implied waiver exemplified by the Illinois authorities. Defendants denied liability shortly after being notified of the loss, and during the ensuing investigation never retreated from that position. There were no negotiations between the parties looking toward settlement. Plaintiff realized that it was required by the provisions of its policies to bring suit within twelve months of the loss and was not in fact led to believe that defendants would not rely on the time for suit limitation. See *Advanced Methods, Inc.* v. *Grain Dealers Mutual Ins. Co.*, 7 Cir., 274 F. 2d 634 (1960). We conclude that the doctrine of implied waiver may not be extended to encompass the factual situation before us.

Since there was no waiver of the time for suit limitation, the only acts of vandalism or malicious mischief which are not barred by the limitation are those alleged to have occurred within twelve months prior to January 12, 1956, the date this action was commenced. The acts alleged to have occurred on January 12, 13 and 14, 1955 are within this period.

In answer to interrogatories, plaintiff stated that it had no knowledge of the amount of damage caused by the acts of vandalism and malicious mischief occurring on January

12, 13 and 14, 1955 and that it was impossible to state what particular act or acts occurred on any particular day. It was proper for the district court to consider plaintiff's answers to interrogatories in ruling on the motion for summary judgment. *United States* v. *Kansas Gas and Electric Company*, 10 Cir., 287 F. 2d 601 (1961).

The burden of segregating the losses for which it could recover from those for which it could not recover was on plaintiff. *Morris* v. *Western States Mutual Automobile Ins. Co.*, 7 Cir., 268 F. 2d 790, 793 (1959); *Springfield M. C. Fire Ins. Co.* v. *Merriman*, 134 Ill. App. 249, 251 (1907). Plaintiff admits it does not know the amount of damage resulting from the acts committed on the three days within the twelve month limitation and that it is impossible to state exactly when the acts occurred. It is clear, therefore, that it could not sustain its burden of proving which losses were attributable to the acts occurring on these three days.

The district court did not err in entering summary judgment with respect to the group 2 policies. The facts not open to question show there was no waiver under Illinois law. By plaintiff's own statement, it would be unable to sustain its burden of proof requisite to recovery for alleged occurrences during the three day period not barred by the policy limitation.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

In The United States District Court
(Caption—No. 56 C 100)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

This cause coming on to be heard on the motion of defendants for judgment on the pleadings as to certain counts of the complaint; to wit, Counts 1, 5, 8, 12, 14, 15, 16, 20, 22, 24, 27, 29, 31, 34, 37, 40, 43, 46, 48, 50, 52, 54, 57, 59, 61, 63, 64 and 66 and for summary judgment as to certain other counts of the complaint; to wit, Counts 2, 3, 4, 6, 7, 9, 10, 11, 13, 17, 18, 19, 21, 23, 25, 26, 38, 30, 32, 33, 35, 36, 38, 39, 41, 42, 44, 45, 47, 49, 51, 53, 55, 56, 58, 60, 62, 65 and 67, and the Court having considered the pleadings, affidavits, motions, briefs, exhibits, and other materials submitted on behalf of the respective parties hereto, and having been fully advised in the premises, hereby makes the following findings of fact and conclusions of law relative to the matters in controversy herein.

FINDINGS OF FACT.

1. This is an action brought by plaintiff against defendants, and each of them, to recover on 67 policies of insurance for damages allegedly caused to plaintiff by various acts of vandalism and malicious mischief, which acts allegedly occurred during a period beginning February 1, 1953 and ending January 14, 1955.

2. Plaintiff's amended complaint is in 67 separate counts, each count being brought upon a separate policy

of insurance. The amount in controversy in each separate count is alleged to be in excess of the sum of three thousand dollars ($3,000), exclusive of interest and costs.

3. Plaintiff, The Sager Glove Corporation, is and at all times relevant was, a corporation organized and existing under and by virtue of the laws of the State of Illinois and is a citizen of said state.

4. Each of the insurance company defendants herein is, and at all times relevant herein was, a corporation organized and existing under and by virtue of the laws of a state other than the State of Illinois, or of a foreign country and are diverse in citizenship from plaintiff.

5. Each of defendants issued to plaintiff policies of insurance written in terms prescribed by the Commissioner of Insurance of the State of Illinois pursuant to statutory authorization. Each of said policies provide coverage, inter alia, against the perils of vandalism and malicious mischief. Each of said policies provide, inter alia:

> "Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss".

6. Plaintiff commenced its suit in this court on January 12, 1956. Plaintiff seeks recovery for damages from losses allegedly occurring during the period from February 1, 1953 to January 14, 1955. It is alleged by plaintiff that these losses were not discovered by it until "on or about January 14, 1955". It is further alleged by plaintiff in its amended complaint (in allegations identical to those which appeared in the original complaint, which complaint was dismissed upon motion of defendant):

"11. . . . Immediately upon the discovery (of the acts of vandalism and malicious mischief) by plaintiff, the plaintiff gave written notice to this defendant thereof."

"12. The defendant, shortly after receiving the aforesaid written notice, denied liability therefor under the aforesaid policy of insurance."

• • •

"14. Although plaintiff has requested the said defendant, to adjust and settle the amount of the loss and damage so sustained, the defendant failed and refused to pay any part of such loss and damage so sustained."

7. The only alleged acts of vandalism or malicious mischief which are alleged to have occurred within twelve months next prior to the date of commencement of this action, are those acts alleged to have occurred on January 12, 13, and 14, 1955.

8. Each of the policies pleaded in counts 1, 5, 8, 12, 14, 15, 16, 20, 22, 24, 27, 29, 31, 34, 37, 40, 43, 46, 48, 50, 52, 54, 57, 59, 61, 63 64 and 66 (hereinafter referred to as Group A) expired more than twelve months next prior to the commencement of this action. Following is a list of the effective dates of the policies in the aforementioned counts.

a. February 1, 1953 to March 7, 1953: Counts 1, 5, 8, 12, 14, 16, 24, 31, 34, 37.

b. February 1, 1953 to December 20, 1953: County 15, 27.

c. February 1, 1953 to October 28, 1953: Count 20.

d. February 1, 1953 to July 3, 1953: Count 22.

e. February 1, 1953 to October 18, 1953: Count 29.

f. February 1, 1953 to November 2, 1953: Counts 46, 48, 61, 64.

g. February 1, 1953 to October 1, 1953: Counts 50, 54, and 63.

h. February 1, 1953 to May 8, 1953: Count 52.

i. February 1, 1953 to May 7, 1953: Counts 57 and 59.

j. February 1, 1953 to January 15, 1954: Counts 40, 43, and 66.

9. As a defense to each of the aforementioned counts designated as Group A and for all other losses which allegedly occurred up to and including the date of January 11, 1955, defendants have alleged the aforerecited limitations provision appearing in each of the policies. (Paragraph 5, supra.)

10. Plaintiff, in reply to said defense, states:

"1. In reply to paragraph 16 of said Answer, Plaintiff admits that the respective policies of insurance herein sued upon did contain a provision set forth in paragraph 16. Plaintiff states that it did in fact comply with each and every relevant and necessary requirement thereof and further states that this suit was filed within twelve (12) months next after the discovery of the loss giving rise to this cause of action.

11. In regard to its claim for damages which allegedly occurred on January 12, 13, and 14, 1955, plaintiff states in answer to interrogatories served upon it:

"Plaintiff has no knowledge of the amount of property damage or loss due to business interruption or property damage due to any acts of vandalism and malicious mischief committed on January 12, 13 and 14, 1955. The acts were continuous and of such a na-

ture and so hidden that it is impossible to state what particular act or acts or phases thereof took place on any particular day."

12. Defendants have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure as to the counts hereinabove referred to as Group A for the reason that it affirmatively appears from the pleadings herein filed that each of said policies had expired earlier than a date within twelve (12) months next prior to the commencement of this suit. (The last of the policies in Group A expired January 15, 1954, three days shore of two years prior to the commencement of this suit and approximately one year prior to the date at which it is alleged the losses herein were discovered.) As to the remaining counts of the complaint (hereinafter referred to as Group B), defendants move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment as it affirmatively appears from the pleadings, interrogatories, and answers thereto, that plaintiff cannot sustain the burden of proof imposed upon it by law first, insofar as establishing its damages is concerned, and second, in establishing the jurisdiction of the court over this action. In addition, said motion for summary judgment on the policies in Group B is in part predicated upon the limitations provision of the policy insofar as the Group B counts concern losses which occurred up to and including January 11, 1955.

13. Plaintiff in reply to defendants' motions alleges by way of affidavit, incorporated by reference in an amended reply filed April 19, 1962, that plaintiff, after the filing of proofs of loss submitted to examinations under oath and that "defendants never notified the plaintiff that its claim was rejected." Said allegations did not appear in the origi-

nal reply filed October 7, 1959 and are contradictory to the averments of the complaint and amended complaint.

14. Defendants have moved to strike the matters set forth in the reply as improper in form and as contrary to the averments herein appearing in the pleadings on file since 1956.

CONCLUSIONS OF LAW

1. The court, on the allegations of the amended complaint, has jurisdiction of the subject matter and parties to this action.

2. The plaintiff is barred by virtue of the twelve month limitations provision of the policies from bringing suit on the policies hereinabove identified as Group A.

3. Plaintiff cannot be heard to contradict its deliberate and unequivocal admission in its complaint and amended complaint that defendants denied liability shortly after receipt of notification of plaintiff's claim.

4. Paragraph 2 of the amended reply herein is improper in form, and is improper in law in that it is at variance with the averments of the complaint and amended complaint and is contrary to the specific claims made by plaintiff since the commencement of this suit in 1956.

5. Plaintiff's claim on those policies designated as the Group B policies for loss occurring up to and including the date of January 11, 1955 is barred because of the twelve month limitations provision appearing in each of the Group B policies.

6. Plaintiff's claim for damages for loss occurring on the dates of January 12, 13, and 14, 1955 cannot be brought as plaintiff admittedly has no knowledge of the amount of said damage and therefore cannot meet the burden of proof imposed upon it in regard thereto.

JUDGMENT

7. Judgment is hereby entered in favor of defendants its motions and the complaint is hereby dismissed.

Enter:

/s/ J. S. Perry
Judge

ated: Sep 24 1962

APPENDIX III.

Judgment of the United States Court of Appeals for the Seventh Circuit, entered May 10, 1963, omitting caption, in words and figures as follows:

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.